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AUSTRALIA'S *TAMPA* INCIDENT: THE CONVERGENCE OF INTERNATIONAL AND DOMESTIC REFUGEE AND MARITIME LAW IN THE PACIFIC RIM

INTRODUCTION TO THE MARITIME LAW FORUM

Craig H. Allen[†]

I. INTRODUCTION

The members of the Pacific Rim Law & Policy Journal are to be congratulated for their initiative, compassion, and insight in calling attention to the August 26, 2001 M/V *Tampa* incident and subjecting the actions of the involved principals and the governing legal regime to close and thoughtful scrutiny. Planning for the April 22, 2002 symposium in Seattle began in the fall of 2001, shortly after the *Tampa's* week-long crisis involving 438 migrants garnered international attention. Speakers for the Symposium conference, recruited under the leadership of the Journal's 2001-2002 Editor-in-Chief, Kelly Thomas, hailed from Australia, Europe and throughout the United States. Two key student papers published in an earlier issue of the Journal provided essential background information and analysis of the maritime¹ and refugee law² issues raised by the incident. Through their efforts over the past year and a half, the members of the Journal have clearly distinguished this publication as a progressive forum for legal and policy questions affecting the Pacific Rim. It was my pleasure to work with them in bringing the project to fruition.

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¹ Jessica E. Tauman, Comment, *Rescued at Sea, But Nowhere to Go: The Cloudy Waters of the Tampa Crisis*, 11 PAC. RIM L. & POL'Y J. 461 (2002). Ms. Tauman's comment notes that the IMO Maritime Safety Committee has concluded that the U.N. Convention Against Transnational Organized Crime and the Protocol Against the Smuggling of Migrants by Land, Air and Sea may provide a possible solution to some aspects of the problem if and when they enter into force. *Id.* at 494.

² Emily C. Peyser, Comment, *"Pacific Solution?" The Sinking Right to Seek Asylum in Australia*, 11 PAC. RIM L. & POL'Y J. 431 (2002).

II. THE MARITIME LAW ARTICLES

At the April 2002 Symposium, two distinguished speakers presented their analyses of the maritime law issues raised by the *Tampa* Incident off the Australian coast. Their articles, both of which incorporate significant post-conference research and analysis, follow this introduction. Despite the organization of this Symposium on the *Tampa* Incident into two panels—one examining the maritime law issues and a second focusing on the refugee law issues—the reader will no doubt quickly realize that both sets of issues must be considered together if there is to be any hope for a workable solution.

Professor Martin Davies, the Admiralty Law Institute Professor of Maritime Law and Co-Director of the Maritime Law Center at Tulane Law School, has titled his written contribution to the Symposium, *Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea*.³ His article focuses on the legal issues surrounding the duty of rescue, while also identifying the considerable disincentives for mariners on commercial vessels to provide rescue in incidents like those which confronted the *Tampa* following the foundering of the ferry *Palapa I*.

Commander Frederick J. Kenney, Jr., joined in his article by Lieutenant Vasilios Tasikas, is a distinguished Coast Guard attorney whose recent service has been in the Coast Guard Office of Maritime and International Law and as Coast Guard Liaison Officer with the Office of Ocean Affairs in the U.S. Department of State. As part of their duties, Commander Kenney and his co-author Lieutenant Tasikas have served in various capacities on the U.S. delegation to the International Maritime Organization (“IMO”). Their Symposium article, *The TAMPA Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea*,⁴ provides an “insiders” update on the response to the *Tampa* incident within the IMO and its several committees, while at the same time suggesting that a true global solution to the problems ship captains may face in trying to land rescued migrants is not yet in sight.

³ Martin Davies, *Obligations and Implications for Ships Encountering Persons in need of Assistance at Sea*, 12 PAC. RIM. L. & POL’Y J. 109 (2003).

⁴ Frederick J. Kenney Jr. & Tasikas, *The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea*, 12 PAC. RIM. L. & POL’Y J. 143 (2003).

A. *Martin Davies: Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea*

Professor Davies' article begins with a thorough examination of the jurisdictional bases under international law for legally compelling shipmasters to provide rescue or assistance to those in distress at sea. He then concludes that the obligation to rescue can only effectively be given legal force by the flag state. Some might question the need for a contemporary analysis to rely on the legal fiction that explains jurisdiction over acts on board vessels as an exercise of the flag state's "territorial" jurisdiction⁵ rather than recognize that jurisdiction over such vessels does not neatly fit into any of the classic bases described in the *Harvard* project.⁶ Professor Davies' conclusion that the responsibility for enforcement will fall on flag states is nevertheless a sound one.⁷ When the flag state responsibility conclusion is added to the fact that the majority of the world's merchant fleet sails under flags of convenience, the prospects for an enforceable legal regime requiring rescue at sea are poor. This is due to the fact that flag of convenience states are notoriously reluctant to enforce legal obligations imposed by international conventions applicable to their vessels.⁸ While this

⁵ See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES §402, cmt. h & §502(2), cmt. d (1987) [hereinafter "RESTATEMENT"]; see also IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 317 (4th ed. 1990) (concluding that "[t]he view that a ship is a floating part of state territory has long fallen into disrepute"). Article 91 of the LOS Convention refers to a vessel's "nationality," which seems closer to the mark than territoriality. The basis for jurisdiction might seem to be of mere academic interest until one considers that refugees on board ships are not treated as if they are in the territory of the ship's flag state. Cf. *Jee v. Weedin*, 24 F.2d 962 (9th Cir. 1928) (holding that Chinese immigrant did not "enter" the United States by embarking on a U.S. flag vessel). Strict application of the territoriality fiction would also suggest that children born on a vessel might claim citizenship in the state whose flag the vessel flies. But see *Mow v. Nagle*, 24 F.2d 316 (9th Cir. 1928) (holding that child born of Chinese parents on board U.S. flag vessel while on the high seas was not born in the United States for purposes of citizenship).

⁶ *Harvard Research in International Law and Jurisdiction With Respect to Crimes*, 29 AM. J. INT'L L. (Supp. No. 1) 435 (1935). See also RESTATEMENT, *supra* note 5, §402.

⁷ The Canadian court's decision in *State of Romania v. Cheng*, [1997] 34 W.C.B.(2d) 168, is instructive. In that case Romania had requested extradition of seven officers from the Taiwanese-flag container ship *Maersk Dubai* for allegedly throwing Romanian stowaways overboard to their death in two separate incidents while the vessel was en route to Canada. Construing the extradition treaty, the court concluded that the alleged offense did not occur in the "territory" of Romania, and that the court therefore lacked jurisdiction to extradite them to Romania. The ship's officers were repatriated to Taiwan, ostensibly for trial.

⁸ In the companion article, Kenney and Tasikas cite one author's conclusion that the United States has never enforced the implementing U.S. statute, 46 U.S.C. §2304. See Kenney & Tasikas, *supra* note 4, at 150, n.33 (citing Patrick J. Long, *The Good Samaritan and Admiralty: A Parable of a Statute Lost at Sea*, 48 BUFFALO L. REV. 591 (2000)). They also note, however, that a U.S. Navy court-martial convicted

certainly adds fuel to the debate over whether flag of convenience states are "effectively exercising jurisdiction and control" over vessels flying their flag, as Article 94 of the United Nations Convention on the Law of the Sea ("LOS Convention") requires,⁹ the more pressing question concerns what effect the seemingly inevitable shortfall in enforcement is likely to have on the masters and crews of vessels that might be asked to provide assistance.

The underlying assumption of the coercive approach, that Twenty-First Century mariners might not go to the rescue of a fellow mariner in distress if not coerced by potential legal sanctions, will no doubt sound unduly cynical, if not insulting, to most mariners. On the other hand, the post-collision conduct of the masters of the S/S *Golden Gate*,¹⁰ the T/V *Virgo*, and the T/V *Bow Eagle*,¹¹ and the treatment of stowaways on the *Maersk Dubai*,¹² all demonstrate that not all mariners share Captain Rinnan's professional and humanitarian commitment. In each of the cited collision cases, the tankers failed to search for survivors following what turned out to be a fatal collision with a fishing vessel.

Professor Davies next identifies the commercial disincentives for ship-owners and their masters to be overly diligent in detecting and responding to distressed "boat people." Unfortunately, the Good Samaritan whose acts delay the arrival of the vessel and her cargo may be admired for the deed, but will likely not be rewarded or compensated in the commercial world.¹³ Indeed, in the United States the ship-owner for the seagoing Good Samaritan might well find itself—to use the words of Dean Prosser¹⁴—

a naval vessel's commanding officer for failing to do more than merely provide provisions to a boat-load of Vietnamese refugees encountered at sea. *Id.* at 152, n. 40.

⁹ United Nations Convention on the Law of the Sea, Dec. 4, 1982, U.N. Doc. A/Conf.62/121, 1833 U.N.T.S. 397, 21 I.L.M. 1245 (1982) (*entered into force* Nov. 16, 1994) [hereinafter "LOS Convention"].

¹⁰ *Favaloro v. S/S Golden Gate*, 687 F. Supp. 475, 478, 1988 A.M.C. 818 (N.D. Cal. 1987) (consolidated wrongful death actions by survivors of deceased fishing vessel master and crewman); *United States v. Hilger*, 867 F.2d 566, 1989 A.M.C. 926 (9th Cir. 1989) (dismissing criminal indictment against tanker's master on grounds of improper venue).

¹¹ The hit-and-run collisions between the Cypriot tanker *Virgo* and the U.S. fishing vessel *Starbound*, resulting in the deaths of three of the latter's crewmen, and the Norwegian tanker *Bow Eagle* and French fishing vessel *Cistude*, which took the lives of four fishermen, are referenced in Kenney & Tasikas, *supra* 4, at 152, n. 40.

¹² See *supra* note 7.

¹³ Under some circumstances the assisting vessel may be entitled to recover in quasi-contract expenses incurred in providing rescue from the vessel on which the assisted person was a crewmember or passenger. See, e.g., *Peninsular & Oriental Steam Nav. Co. v. Overseas Oil Co.*, 553 F.2d 830, 1977 A.M.C. 283 (2d Cir.), *cert. denied*, 434 U.S. 859 (1977); *Leiton v. ARCO Marine, Inc.*, 896 F. Supp. 1001, 1996 A.M.C. 702 (C.D. Cal. 1995).

¹⁴ W. PAGE KEETON, PROSSER & KEETON ON TORTS 378 (5th ed. 1984) ("The Good Samaritan who tries to help may find himself mulcted in damages, while the priest and the Levite who pass by on the other side go on their cheerful way rejoicing.").

“mulcted in damages.”¹⁵ On the other hand, the present “lack-of-insurance coverage” disincentive Davies identifies is easily overcome. Protection and Indemnity (“P&I”) Clubs are *mutual* associations, whose members determine the rules of coverage. If a majority of the ship-owning members support extending coverage to *Tampa*-like delay expenses, either by amendment to the Club’s rules or by liberal application of the omnibus clause,¹⁶ nothing stands in their way. Of course, this merely spreads any such losses among all the members of the P&I Club.

The absence of an effective legal regime requiring vessels to provide assistance at sea and the commercial disincentives for doing so might, by themselves, lead to an increased reluctance by some merchant vessels to assist distressed migrants at sea. When reports of rescued migrants threatening their rescuers with “drastic action” unless they are taken to a place of *their* choosing, as did the *Tampa*’s rescuees, and of the reluctance of nearby port states to allow the rescued migrants to be landed are added to the equation, the combined result is likely to be, as Professor Davies suggests, that more migrants will die at sea.

B. Frederick J. Kenney, Jr. & Vasilios Tasikas, The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea

The *Tampa* Incident was widely reported and debated in professional mariner periodicals.¹⁷ Many of those mariners are therefore waiting to hear the IMO response. Will the response be, like others that mariners have heard so often, “to study and collect data,” as it has been with the piracy and armed robbery epidemic? Will it simply impose new burdens on vessels, as does the present regime for stowaways? Unfortunately, initial indications are not promising.

Early in their article Commander Kenney and Lieutenant Tasikas distinguish the duty to provide “assistance,” which is applicable to mariners at sea, and the duty of “rescue,” which is imposed on states. Because only the latter extends to “delivery to a place of safety,” the distinction may seem to be an important one for the mariner. The authors further suggest that the

¹⁵ See, e.g., *Berg v. Chevron U.S.A., Inc.*, 759 F.2d 1425, 1986 A.M.C. 360 (9th Cir. 1985) (negligence action against owner of tanker that attempted rescue of fishing vessel).

¹⁶ The so-called “omnibus” clause generally permits the Club’s directors, at their discretion, to extend a member’s cover to a non-enumerated risk on a case-by-case basis.

¹⁷ See, e.g., Michael White, *The Tampa and the Law*, SEAWAYS: INT’L J. NAUTICAL INST., Oct. 2001, at 5.

"place of safety" phrase might be interpreted to extend to another vessel, such as a coastal state patrol or naval vessel, where the migrants would be held while allowing the assisting vessel to depart. Whether professional mariners will really find attempts to distinguish "assistance" from "rescue" significant in determining the extent of their response is doubtful, particularly if, as in the *Tampa* incident, the persons assisted must be brought on board the assisting vessel. In such situations, the disincentives Professor Davies identifies may well deter less responsible mariners from responding.

The authors also suggest that the migrant disembarkation problem and the place of refuge issue share many features in common. They conclude that because the two issues share "important aspects," they are "substantially linked" and should be addressed "concurrently and together." The logic in the invitation is tempting. It must be recalled, however, that the national positions on places of refuge have already lined up behind a "soft" approach that appears to defer completely to the coastal state, at least if there is no immediate danger to life.¹⁸ Some might also worry that problem-solving energy and momentum for one problem is often diffused or extinguished altogether when that problem is linked to another less tractable problem, and key players insist that both be addressed at the same time. The result is too often that both the number of issues that must be dealt with and the cast of players spiral out of control, solutions for either problem are delayed, and any "consensus" solution to both problems might ultimately prove inadequate for either.

Perhaps future scholarship and debate within the IMO will examine the relationship between the long-established but poorly defined international maritime law doctrine of *force majeure*¹⁹ and modern attempts to apply it in the sense of providing a "place of refuge" for imperiled vessels or a port of disembarkation for persons rescued at sea. *Force majeure*, a protean concept, takes on many applications, particularly in the commercial law context, where it may be raised as a defense to a breach of contract action. It has been cited as grounds for exempting vessels from coastal state jurisdiction.²⁰ The LOS Convention recognizes it, along with distress or the rendering of assistance,²¹ as one of the three recognized exceptions to the

¹⁸ See Kenney & Tasikas, *supra* note 4, at 170.

¹⁹ See MYRES S. MCDUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 110 & nn. 61-62 (rev. ed. 1987); D.P. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 853-58 (2d ed. 1982).

²⁰ See RESTATEMENT, *supra* note 5, §512, reporter's note 5.

²¹ The United States takes the position that there is a limited "right of assistance entry" into the territorial sea of another nation. See U.S. Senate, Treaty Doc. 103-39, United Nations Convention on the

ordinary rule that a vessel's transit must be continuous and expeditious to qualify the vessel for the right of innocent passage.²² Some U.S. statutes recognize a *force majeure* exception to their application.²³ Not all *force majeure* cases implicate immediate danger to human life. Indeed, many may endanger property only, as when a vessel's crew has been evacuated, but the vessel itself is still in danger. Whether the customary law norm might be expanded (or codified in conventional law) to serve as a justification for entry into a foreign port or internal waters—other than in cases where necessary to preserve human life²⁴—without prior express or implied port state authorization, is an intriguing question relevant to both *Tampa*-like cases and the places of refuge debate.²⁵

Rear Admiral Pluta's remarks to the IMO on behalf of the United States, quoted in Cdr. Kenney's and Lt. Tasikas' article,²⁶ dim the hopes for a "Norwegian solution" to *Tampa*-like incidents, described by the authors. The U.S. position, mirroring U.S. practice for more than two decades,²⁷ calls for cooperation and coordination but ultimately leaves the final decision regarding disembarkation with the port state. Cynics would say this is merely another example of an offer to substitute process for a substantive

Law of the Sea, with Annexes, and the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, with Annex, and Message from the President of the United States transmitting the Convention and Agreement, Oct. 7, 1994, at 101-02 (concluding that "the Convention provides that passage includes stopping and anchoring for the purpose of rendering assistance to persons, ships or aircraft in danger or distress, thereby expanding upon the customary right of assistance entry.") (emphasis added).

²² See LOS Convention, *supra* note 9, art. 18(2).

²³ See, e.g., 33 U.S.C. § 1905(e)(1) (*force majeure* exception to rule denying U.S. entry to vessels not in compliance with applicable pollution prevention laws). See also *The Brig Concord*, 13 U.S. (9 Cranch) 387 (1815) (holding that "[w]here goods are brought by superior force, or by inevitable necessity, into the United States, they are not deemed to be so imported").

²⁴ ROBIN R. CHURCHILL & A. VAUGHN LOWE, *THE LAW OF THE SEA* 63 (3d ed. 1999).

²⁵ One of the prominent "place of refuge" incidents in recent U.S. history involved the cruise ship *M/S Prinsendam* off the coast of southern Alaska. In October 1980, after the vessel was badly damaged by fire and the Coast Guard (working with the T/V *Williamsburgh*, the S/S *Portland* and the S/S *Sohio Intrepid*) rescued the passengers and crew, the owners requested permission from the Coast Guard to bring the vessel in to sheltered waters to permit salvage. See U.S. Coast Guard Message 102231Z Oct. 80 (from Commander, Coast Guard District 17 to Commandant, U.S. Coast Guard) (copy on file with the author). The Coast Guard denied the request, and the vessel later sank. For an account of the rescue operations see Josh Eppinger, *The Prinsendam Fire: History's Greatest Sea Rescue*, *POPULAR MECHANICS*, Apr. 1981, at 102-05, 211-12, 214-16, 218-19.

²⁶ Kenney & Tasikas, *supra* note 4, at 166, n.115.

²⁷ See *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) (holding that the program created by the President for repatriation of Haitian migrants interdicted beyond the territorial sea of United States does not violate the Immigration and Nationality Act or the U.N. Convention relating to the Status of Refugees); see also *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986) (holding that, as a matter of U.S. law, a president may, in exercise of the president's foreign affairs powers, indefinitely detain Cuban refugees even if such action violates customary international law).

rule. Of course, the process itself provides no basis for mariners to predict the outcome. Although the U.S. proposal arguably meets the three goals set out in IMO Resolution 920(22),²⁸ any approach that requires little more than coordination and cooperation and leaves the final decision squarely with the coastal state, to be exercised on a case-by-case basis, may lead to delays by coastal states that might impede or discourage rescue efforts.²⁹ By substituting ad hoc, case-by-case decisions for a rule of law, the approach also increases the probability that some decisions will be made on domestic political and economic grounds that might fail to adequately take into account the interests of the migrants or their rescuers or the shared interest in fair and humane treatment of distressed persons.

Despite the shortcomings in the United States/Australian approach, the "Norwegian solution," which would give discretion to the master of a rescuing vessel to decide where persons may be landed—characterized by Kenney and Tasikas as "turning international law on its head"—is fraught with so many difficulties that any convention that incorporated such a rule is not likely to attract the ratifications necessary for its success.³⁰ The "nearest suitable port" standard incorporated in the "Norwegian solution" also fails to address situations like those on the *Tampa*, where the rescuees threaten the master if they are not taken to a place of their choosing. As Admiral Pluta warns in his remarks, such a rule might be used by the smuggling vessel itself as grounds for landing the vessel's migrants, thus triggering the port state's international responsibility to process any applications for asylum. Unless the international community is willing to accept something analogous to a free trade zone,³¹ in which rescued persons landed are not yet deemed

²⁸ The second goal in the Resolution—that "ships which have retrieved persons in distress at sea are able to deliver the survivors to a place of safety"—is perhaps the most contentious. See *Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea*, 22nd Sess., Agenda Item 8, IMO Assembly Res. A.920(22) (Nov. 2001).

²⁹ The approach appears to be the one taken in Australia's "Protocol for Commercial Shipping Rescuing Persons at Sea in or Adjacent to the Australian Search and Rescue Region," described in Davies, *supra* note 3, at 11, n. 6. Mariners and ship-owners reading the Protocol may understandably feel overwhelmed by the information demands imposed on a rescuing vessel. For example, the rescuing vessel is expected to provide Australian authorities the name, flag, description and call sign of the distressed vessel, her port of origin and destination, and the number of rescued persons and the countries where those persons have a right of entry. See Australian Department of Transport and Regional Services, *Protocol for Commercial Shipping Rescuing Persons at Sea In or Adjacent to the Australian Search and Rescue Region*, available at http://www.dotars.gov.au/transinfra/sea_rescue_protocol.htm (last visited Dec. 13, 2002).

³⁰ Consider, for example, the International Convention Relating to Stowaways, which was drafted in 1957 but has still not yet attracted sufficient ratifications to enter into force. 6 BENEDICT ON ADMIRALTY, Doc. No. 2-4 (Frank L. Wiswall ed., 7th rev. ed. 2001).

³¹ Foreign or domestic merchandise in designated "free trade zones" in the United States are generally exempt from customs laws while so stored. See 19 U.S.C. § 81c (2000). Such an approach to migrants rescued at sea would likely be flatly rejected by the international human rights community, which

officially arrived for purposes of its immigration laws,³² some potential destination states are likely to actively oppose the landing of distressed or rescued migrants.

III. POST-SCRIPT

Most would agree that the world has changed in many ways since August 26, 2001, when the *Tampa* went to the rescue of the *Palapa I* passengers and crew. Sadly, it appears that many of the desperate rescuees, whose attempted migration to Australia set the *Tampa* crisis in motion, have abandoned their efforts and returned to Afghanistan.³³ Meanwhile, the incidence of terrorism and other threats to vessels is on the rise, creating further disincentives for merchant vessels to answer calls for assistance. Within the United States, the 107th Congress enacted legislation that will dramatically change the government organization and procedures for maritime security. Meanwhile, decrepit and overloaded vessels continue to come to grief, with appalling loss of life and damage to the marine environment.

A. *The Terror Factor*

In the months since the *Tampa* Incident, the United States suffered the devastating attacks of September 11, 2001, the Taliban were forcibly removed from power, and ninety-two Indonesians and tourists from Australia, Belgium, Ecuador, Finland, France, Germany, Great Britain, Italy, Japan, The Netherlands, New Zealand, South Africa, South Korea, Sweden, Switzerland, Taiwan, and the United States were killed in the October 12, 2002 terrorist attack on two Indonesian nightclubs on the resort island of Bali. On October 6, 2002, terrorists on board an explosives-laden small boat attacked the French tanker *Limburg* off the coast of Yemen, not far from Aden, where the U.S. destroyer U.S.S. *Cole* was similarly attacked two years

would almost certainly view it as an attempt to mask what would really amount to *refoulement* or acts of unlawful expulsion.

³² One notorious example of such a practice by the United States is reflected in the use of the leased Naval Base at Guantanamo Bay, Cuba. See, e.g., *Rasul v. Bush*, 215 F. Supp. 2d. 55 (D.D.C. 2002) (suit on behalf of aliens detained at Guantanamo Bay Naval Base dismissed for lack of jurisdiction over the base, which is outside sovereign jurisdiction of the United States).

³³ See *Afghan Asylum Seekers "Forced to Leave" Camp*, CNN.com News, Nov. 18, 2002, at <http://www.cnn.com/2002/WORLD/asiapcf/auspac/11/18/story.aus.refugees/index.html> (reporting that 113 of the Afghan asylum seekers returned home to Kabul from Nauru, saying they were forced to leave by the unbearable conditions at the Nauru detention camp).

earlier, leaving seventeen sailors dead and thirty-nine wounded.³⁴ Finally, piracy and other attacks on ships by armed looters—often in the same waters where human smuggling operations are common—have been on the rise for more than a decade.³⁵ One can reasonably expect that mariners will grow increasingly wary of approaching any unidentified boat and might well be forced to wonder whether an apparent distress call is really just a ruse for robbery or terrorist attack.³⁶

B. "Homeland Security": New Primacy?

The reader might also note that the U.S. Coast Guard, the nation's maritime search and rescue agency, will soon find a new organizational home in the Department of Homeland Security, established in the final days of the 107th Congress.³⁷ At the same time, the Coast Guard will be challenged with implementing the Maritime Transportation Antiterrorism Act of 2002.³⁸ Whether the changes will undermine the Coast Guard's historical search and rescue operations was enough of a concern to Congress that it included language expressly instructing the new Secretary to guard against the risk.³⁹ In the meantime, the Coast Guard continues to carry out the nation's long-standing policy of interdicting U.S.-bound migrants at sea—primarily Haitians and Dominicans on the east coast and Chinese nationals on the west coast—often repatriating them before they land on U.S. soil.⁴⁰ A brief filed by the U.S. Immigration and Naturalization Service opposing the release of more than 200 Haitian migrants who swam ashore

³⁴ One crewman on the *Limburg* was killed and 90,000 barrels of oil were released as a result of the bomb damage. See *Yemen Acknowledges Terror Attack on French Tanker*, USA TODAY.COM, Oct. 24, 2002, at http://www.usatoday.com/news/world/2002-10-17-yemen-attack_x.htm.

³⁵ See generally JOHN S. BURNETT, DANGEROUS WATERS: MODERN PIRACY AND TERROR ON THE HIGH SEAS (2002) (documenting the resurgence of piracy and other armed attacks against ships, with particular emphasis on the Straits of Singapore and Malacca and the South China Sea).

³⁶ See, e.g., Sean Young, *Seafarers Face Threats of Terrorism*, AP Online, Oct. 23, 2002 available at 2002 WL 101565408 (reporting data from the International Maritime Bureau in Kuala Lumpur, Malaysia documenting 271 attacks on ships between January and September of 2002).

³⁷ See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

³⁸ See Maritime Transportation Antiterrorism Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064 (2002).

³⁹ See Homeland Security Act of 2002, *supra* note 37, §888(e)(1) ("Preserving Coast Guard Mission Performance").

⁴⁰ See Alfonso Chardy, *Coast Guard Intercepts, Repatriates 238 Haitians*, MIAMI HERALD, Nov. 14, 2002 available at 2002 WL 102931189. The U.S. policy is described in the article by Commander Kenney and Lieutenant Tasikas; see also United Nations G.A. Res. 55/74, ¶15 (2000) (reaffirming that "voluntary repatriation is the preferred solution to refugee problems," but only when it can be accomplished with safety and dignity).

from their fifty foot boat near Key Biscayne, Florida on October 29, 2002,⁴¹ raised "national security" concerns over the possibility that Haiti is now also serving as a gateway for migrants from other nations to enter the United States.⁴²

C. Places of Refuge: An Issue That Will Not Go Away

In November 2002, the "places of refuge" debate was back on the front pages of the world's news services as salvage tugs responded to the crippled tanker *Prestige*, which developed a hull fracture while off the Atlantic coast of Spain en route to Gibraltar. Spain refused requests to bring the twenty-six-year-old tanker, laden with 77,000 tons of fuel oil, into sheltered waters to pump off the cargo.⁴³ The vessel was towed to sea, where it eventually sank. The *Prestige* flew the flag of The Bahamas, which, as Professor Davies reminds us, is one of the leading flag of convenience states.

It is still too early to predict what effect the *Prestige* incident will have on the places of refuge debate at the IMO. Shortly after the incident, William O'Neal, Secretary General of the IMO, defended the Organization's record on marine safety and pollution prevention, arguing that calls for tightening the existing legal regime "can be handled fairly readily under the existing work programme" of the IMO.⁴⁴ Paul Slater, Chairman of First International Shipping Corporation, was not convinced. He criticized the IMO for failing to take a leadership role in the *Prestige* incident, labeled the Organization "toothless," and described it as a "bureaucratic elephant moving at the pace of a snail."⁴⁵ A number of European states agree that the IMO is moving too slowly, at least on standards for tankers. Soon after the sinking of the *Prestige*, Spain, France, and Portugal all moved to ban single-hull tankers from their exclusive economic zones, despite the fact that such

⁴¹ See *Boatload of Haitians Swarms Ashore in Florida*, CNN.COM NEWS, Oct. 29, 2002, available at <http://www.cnn.com/2002/US/South/10/29/haitians.ashore/index.html> (last visited Jan. 19, 2002).

⁴² See Alfonso Chardy, *Holding Haitians a Security Issue*, INS Brief Details, MIAMI HERALD, Nov. 13, 2002, available at 2002 WL 102931046; see also Arthur C. Helton & Dessie P. Zagorcheva, *Globalization, Terror and the Movements of People*, 36 INT'L L. 91, 92 (2002) (concluding that a "serious side effect of the [September 11th] attacks against the United States has been a backlash against migrants and asylum seekers").

⁴³ See Ciaran Giles, *Official Blames Company for Spill*, AP Online, Nov. 23, 2002, available at 2002 WL 103439311 (reporting that SMIT Salvage "repeatedly asked for a port where it could repair the ship or remove the 20 million gallons of fuel oil inside").

⁴⁴ See *IMO Remains Bedrock of Global Standards*, Lloyds List Int'l, Dec. 2, 2002, available at 2002 WL 26532026.

⁴⁵ *Id.*

tankers comply with the existing MARPOL⁴⁶ standards developed through the IMO.⁴⁷ Thus it seems likely that the places of refuge debate will be lengthy and contentious, and that any attempt to link the *Tampa* issues to the place of refuge debate will only delay resolution of either.

D. And Overloaded Vessels Keep on Sinking

At nearly the same time the Afghan migrants recovered by the *Tampa* returned to their war-scarred homeland, the world was reminded yet again of the perils of the sea and the frailty of many of the vessels on which commuters rely when the M/S *Joola*, an overloaded Senegalese ferry, capsized and took 970 of her 1034 passengers to their death.⁴⁸ Half a world away, and not far from the scene of the *Tampa* Incident, an Indonesian ferry carrying more than 180 passengers sank shortly after leaving Abon.⁴⁹ At the time the story was released, at least fifty of the ferry's passengers were still missing at sea. Had Captain Rinnan and his crew on *Tampa* been on watch nearby, the missing passengers might well have found rescue at the hands of mariners whose moral courage, compassion and seamanship skill brought tremendous credit to their ancient profession.

⁴⁶ International Convention for the Prevention of Marine Pollution from Ships, (MARPOL 73/78), IMCO Doc. MP/CONF/WP 35, Nov. 2, 1973, reprinted in 12 I.L.M. 1319 (1973).

⁴⁷ See *Spain, France and Portugal Ban Single Hull Tankers*, LLOYDS LIST INT'L, Dec. 3, 2002, available at 2002 WL 26532064. Such legislation would exceed the coastal state's authority under the LOS Convention, which, absent special circumstances, limits the Coastal State's jurisdiction over vessels in the EEZ to enforcement of generally accepted international rules and standards adopted through the IMO. See LOS Convention, *supra* note 9, arts. 210(5), 220(3).

⁴⁸ See *Senegal Ferry Tragedy: Overcrowding Blamed*, CNN.COM NEWS, Oct. 3, 2002, at <http://www.cnn.com/2002/WORLD/africa/10/03/senegal.ferry/index.html> (reporting that of the 1,034 passengers carried on board a vessel built to carry a maximum of 600, only sixty-four survived the capsizing).

⁴⁹ See *Dozens Missing After Indonesian Ferry Sinks*, CNN.COM NEWS, Nov. 4, 2002, at <http://www.cnn.com/2002/WORLD/asiapcf/southeast/11/03/indonesia.ferry/index.html>. The story solemnly notes that "[m]illions of poor Indonesians rely heavily on ferries to travel around the vast archipelago nation. However, ferry accidents are fairly common with much of the fleet poorly maintained and vessels often seriously overloaded with passengers and cargo." *Id.*